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In the

Supreme Court of the United States

JUNE TERM, 1967

No. ~~1384~~ 155

WILLIAM A. BAGLEY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes	2
Statement	3
Reasons for granting the writ	5
Conclusion	6
Appendix	7

CITATIONS

Correll v. *United States of America,* decided November 29, 1966, U.S.C.A., Sixth Circuit	5
Hanson v. *Commissioner,* 289 Fed. 2d 391	5
Williams v. *Patterson,* 286 Fed. 2d 333	5

STATUTES

Revenue Act of 1962, s. 4 (b), 76 Stat. 960	2
U.S.C.A., Title 26, s. 162 (a) (2)	2 and 3
U.S.C.A., Title 28, s. 1254 (1)	2

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William A. Bagley, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on March 15, 1967.

Opinion Below

The opinion of the Circuit Court of Appeals for the First Circuit is reported at Fed.

Jurisdiction

(1) The judgment of the Court of Appeals for the First Circuit was made and entered on March 15, 1967, and a copy thereof is appended to this petition in the Appendix at page 7.

(2) The Court of Appeals for the First Circuit denied the Petition for Rehearing filed by the Petitioner on April 5, 1967.

(3) The jurisdiction of this Court is involved under Title 28, United States Code, s. 1254 (1).

Questions Presented

The Petitioner, a resident of Milford, New Hampshire, filed tax returns for the years 1960 and 1961, listing his occupation as "Consulting Engineer." In rendering services in this capacity to various public utility companies, Petitioner, during the years in question, traveled distances ranging from 70 to 75 miles from his business location on these business trips, leaving early in the morning and returning late at night. The question presented by this appeal is whether the Petitioner is entitled to deduct the amounts he spent for meals on one-day business trips where he was not absent from his home "overnight."

Statutes

26 U. S. C. 162, the Internal Revenue Code of 1954, s. 162, provides as follows:

> 162 Trade or Business Expenses.
>
> (a) In general – There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –
>
> (1) . . . .
>
> (2) Traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and
>
> (3) . . . .

1954 I. R. C., s. 162 (a) (2). This section was amended in 1962, but in a respect not presently pertinent. Revenue Act of 1962, s. 4 (b), 76 Stat. 960.

Statement

The Commissioner of Internal Revenue determined deficiencies in income tax against the Petitioner for the taxable years 1960 and 1961. These deficiencies were as a result of the Commissioner's refusal to permit Petitioner to deduct amounts expended for meals on business trips during which the Petitioner did not stay away from home overnight. The Petitioner claimed the deductions under s. 162 (a) (2) of the Internal Revenue Code of 1954.

Petitioner a retired engineer, formerly working for General Electric, was carrying on the business of a consulting engineer. During the time in question he was employed by various public utilities throughout the New England area. He performed services for his clients, including the preparation of wiring diagrams, supervising the installation of equipment, adjusting the equipment after installation and training personnel in the operation of the equipment. Petitioner's specialty was in the automation of generating stations.

In order to carry out his duties as a consulting engineer, for which he received remuneration at the rate of $100.00 per day, Petitioner was required to perform other services during the periods of his employment, for which he did not charge his employers. During 1960, Petitioner spent approximately 115 days prior to doing the actual engineering work, to obtain information and study the equipment in use. For these trips he received no compensation or allowance for expenses incurred in making the trips. During 1961, Petitioner performed services in connection with generating stations located approximately 70 miles from his home and office and he spent 83 days for which he received $100.00 per day and 67 days for which he made no charge and was not reimbursed for his expenses.

During 1960 and 1961, Petitioner left his home at approximately 6:00 A.M. and usually ate his breakfast on the road,

would have his lunch in the vicinity of the generating station where he was working and would eat his dinner on his way back to his home, arriving at approximately 10:00 P.M. each evening. Petitioner testified that he was required to return to his home and office each day whenever possible because of the exigencies of his business. It was in his home that he had his office, all diagrams used or useful in his business, his telephone and other equipment which he required in the preparation of the next day's work. Petitioner was known by his clients to be at his office during the evening hours after ten o'clock and often received calls from his clients.

Petitioner claimed deductions of $1020.00 for 1960 and $979.00 for 1961 as living expenses away from home while on business trips. These deductions were disallowed and his notice of deficiency stated that they "represented non-deductible personal or living expenses."

The Commissioner of Internal Revenue notified Petitioner on October 5, 1962, that for the taxable years 1960 and 1961 "meals, not overnight, disallowed, 1960, $1020.00, 1961, $979.00."

On February 14, 1963, the Appellate Division of the United States Treasury Department notified Petitioner of the above deficiencies. On May 7, 1963, Petitioner filed with the office of the Clerk of the Tax Court of the United States an original and four conformed copies of a petition for redetermination of deficiency. On June 24, 1964, before the Tax Court of the United States, Boston, Massachusetts, this case was tried to a conclusion and the Tax Court held for the Petitioner Bagley, the report issuing on May 5, 1966, by Howard A. Dawson, Jr., Judge.

As a result of this, the Commissioner of Internal Revenue filed a petition for review by the United States Court of Appeals for the First Circuit on August 4, 1966. After oral argument,

the United States Court of Appeals for the First Circuit, on March 15, 1967, ordered that the decision of the Tax Court be vacated and the cause remanded for further proceedings.

Petitioner filed a petition for rehearing in the United States Court of Appeals for the First Circuit, which was denied on April 5, 1967.

Reasons For Granting The Writ

The decision of the United States Court of Appeals for the First Circuit should be reversed because it is in conflict with decisions rendered in other federal courts. The United States Court of Appeals for the Eighth Circuit, in *Hanson* v. *Commissioner,* reported at 298 Fed. 2d 391, reversing 35 T. C. 413, decided that the "overnight" rule was "merely an arbitrary line-drawing, having no basis in the statute."

The *Hanson* decision placed the Eighth Circuit substantially in accord with the Fifth Circuit, which reached the same conclusion in *Williams* v. *Patterson,* 286 Fed. 2d 333 (C. A. 5, 1961). In this case the Court distinctly stated that there is nothing in the statute indicating any Congressional intent that the phrase "away from home" means either overnight or away from home for a period substantially longer than an ordinary working day. The Fifth Circuit in this case recognized the administrative advantages of a rule of thumb for defining the term "away from home." However, it further recognized that between the extremes of any given set of facts there are innumerable border line situations that cannot be measured by the length and breadth of a thumb.

The United States Court of Appeals for the Sixth Circuit, in the case of *Correll* v. *United States of America,* decided November 29. 1966, and reported as #16767 for that Court, sustained the United States District Court for the Eastern District of Tennessee and specifically rejected the Commissioner's "over-

right" or "sleep or rest" rules. The Court, in the *Correll* case, indicated that the remedy lies with Congress and not with the Judiciary.

In the instant case, the Tax Court of the United States, reported at 46 T. C. #15, filed May 4, 1966, entered a decision for the Petitioner by reciting that while the "overnight" rule is one of admitted administrative convenience, it must yield to exceptions, to logic, reason and justice, and decided that it would no longer follow the "overnight" rule as an absolute guide in every situation.

The entire trend of case law is away from the so-called "overnight" rule and for this reason the determination made by the United States Court of Appeals for the First Circuit should be reviewed and reversed.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ certiorari should be granted.

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Appendix

United States Court of Appeals
For the First Circuit

No. 6812.

COMMISSIONER OF INTERNAL REVENUE,

PETITIONER

v.

WILLIAM A. BAGLEY,

RESPONDENT.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

[46 T.C. 176]

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Edward Lee Rogers, Attorney, Department of Justice, with whom *Mitchell Rogovin*, Assistant Attorney General, and *Lee A. Jackson*, Attorney, Department of Justice, were on brief, for petitioner.

Arthur E. Bean, Jr., for respondent.

March 15, 1967.

ALDRICH, *Chief Judge*. Taxpayer, a consulting engineer, maintained his office at his home in Milford, New Hampshire. During the taxable years 1960 and 1961 he was employed from time to time by various power companies in the New England area on a per diem basis. On many of these days he left home early, ate breakfast on the way, ate lunch at work, and stopped to dine on the drive back. His employers' places of business were from thirty to seventy-five miles distant, and taxpayer normally reached home about ten P.M. The sole question is

whether he can deduct the cost of these meals[1] as "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." 1954 I.R.C. § 162 (a) (2).[2]

For the 45 years that this provision has been on the books in substantially its present form the Commissioner has sought to apply a rule of thumb which, in general, has found favor with the Tax Court. See, *e.g., Al J. Smith,* 1960, 33 T.C. 861; *Louis Drill,* 1947, 8 T.C. 902. Some other courts have been critical. See, *e.g., Hanson* v. *Commissioner, infra; Correll* v. *United States, infra.* We cannot find, however, that these courts have substituted anything better. Rather, we believe that to this area of almost unlimited factual variations their admittedly subjective approach brings neither clarification nor ease of application nor, even overall fairness.

The Commissioner's rule was originally known as the overnight rule. Travel did not qualify unless the taxpayer was away from home overnight.[3] As a result of the decision in *Williams* v. *Patterson,* 5 Cir., 1961, 286 F.2d 333, which the Commissioner accepted, this became known as the necessary sleep or rest rule — a trip long enough to require interruption for rest during the day is equivalent to being away overnight.[4] We in no way disagree with *Williams.* It marked, however, the beginning of a broader attack on the rule. In *Hanson* v. *Commissioner,* 8 Cir.,

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[1] Taxpayer sometimes remained at his place of work overnight. The Commissioner does not question the propriety of deductions for meals and lodging on those occasions.

[2] This section was amended in 1962, but in a respect not presently pertinent. Revenue Act of 1962, § 4 (b), 76 Stat. 960.

[3] See discussion in *Kenneth Waters,* 1949, 12 T.C. 414, 417, *Allan L. Hanson,* 1960, 35 T.C. 413, *rev'd, Hanson* v. *Commissioner,* 8 Cir., 1962, 298 F.2d 391.

[4] In *Williams* the taxpayer was a railroad conductor. He left his home in Alabama every morning at about 6:45 A.M. and boarded a train which arrived in Atlanta at 12:15 P.M. He was then off duty until 6:15 P.M., at which time he departed on the return trip and arrived home at about midnight. During the stopover in Atlanta the taxpayer regularly had lunch at a hotel, rented a room

1962, 298 F.2d 391, the taxpayer was in the construction business. He was employed contemporaneously at several different job sites at substantial distances from his home. He normally checked in at his office in the morning, and then visited the various jobs, usually returning late at night. The court concerned itself principally with ruling that the overnight rule was without legal basis. Having determined this, it then decided the case on the ground that *Williams* v. *Patterson* justified the deduction of the lunches and dinner "albeit that the expense is 'personal in nature.' " *Id.* at 397. The court did not discuss the factual complications involved or, apparently, note that *Williams* v. *Patterson,* where there was a substantial rest period involved, was a very different case.[8]

In the case at bar the Tax Court decided to follow *Hanson.* One judge, in concurring on special grounds, expressed what seems to us a poignant regret, that neither the *Hanson* decision nor the Tax Court in the present case had offered any guiding principles to take the place of the Commissioner's rule.

The most recent blow against the Commissioner's rule was struck in *Correll* v. *United States,* 6 Cir., 1966, 369 F.2d 87, 90. In permitting a traveling salesman who returned nightly for dinner to deduct his breakfast and lunch on the road, the court conceded that "the rule adopted by Appellate Courts may not

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and slept for several hours, and had dinner. The question at issue was whether or not his rest was "necessary," since at that time Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 78, permitted a deduction to a railway employee who was released from duty to obtain "necessary sleep." The Commissioner contended that such rest was only necessary when required by the employer. The court rejected this to rule that when it was reasonable for the employee, due to the hours of his employment, to seek rest during his hours off a deduction would be permitted. The Commissioner acquiesced in this holding in Rev. Rul. 61-221, 1961-2 Cum. Bull. 34. See also I.T. 3395, 1940-2 Cum. Bull. 64.

[8] The court also relied upon our case of *Chandler* v. *Commissioner,* 1955, 226 F.2d 467, which, for reasons pointed out *infra,* n. 11, we believe was wrongly decided.

always work satisfactorily," but concluded that "the remedy lies with Congress and not with the judiciary."

With all respect, we suggest that the Commissioner's rule has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself. Furthermore, we believe that the so-called "rule adopted by Appellate Courts" is not a rule at all, and not even a guide.

We start with the principle that both travel and meals away from home are not deductible if they are personal, as distinguished from business, expenses. I954 I.R.C. § 262. If a taxpayer chooses to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience. *Commissioner* v. *Flowers,* 1946, 326 U.S. 456.[•] It is equally clear that a commuter cannot deduct his lunch. *Cf. Fred M. Osteen,* 1950, 14 T.C. 1261. *But cf. Emmert* v. *United States,* S.D.Ind., 1955, 146 F.Supp. 322. Under such circumstances it would seem unfair to allow a deduction for lunch to a man whose business requires him to spend his eight hour day on the road, even though in a sense he is traveling. We have held against such a taxpayer. *Amoroso* v. *Commissioner,* 1 Cir., 1952, 193 F.2d 583, *cert. den.* 343 U.S. 926 (traveling salesman). Nor do we suppose, if a commuter were required to work late at his place of business, that any court would distinguish between his lunch and his supper. *Cf. Jerome Mortrud,* 1965, 44 T.C. 208; *Fred G. Armstrong,* 1965, 43 T.C. 733; *Louis Drill,* 1947, 8 T.C. 902.

While, as has been pointed out, there are certain travel and other expenses of a purely personal nature, the manifest statutory purpose is to permit deductions when business activities

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• A taxpayer who has more than one place of business could not choose to live at all of them. In that event at least some of the travel must be a business necessity. *Cf. Crowther* v. *Commissioner,* 9 Cir., 1959, 269 F.2d 292; see *Chandler* v. *Commissioner,* 1 Cir., 1955, 226 F.2d 467, discussed *infra,* n. 11.

require duplication. Lodging away from home may well be all extra expense.[7] However, even though a meal away from home may be more expensive, presumptively it is not all added cost. And, in fact, prior to the enactment of what is now section 162 (a) (2) in 1921, the Commissioner had promulgated a regulation which permitted the deduction of only that part of the expenses for meals and lodging incurred while traveling "in an amount in excess of any expenditures ordinarily required for such purposes when at home." Treas. Reg. art. 292 (1920 ed.). The difficulties involved in calculating the "excess" under this regulation proved so onerous that the Treasury itself asked Congress to grant a deduction for the "entire amount" of such expenditures for meals and lodging.[8] Accordingly section 214 (a) (1) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, for the first time contained as a subcategory of ordinary and necessary business expenses the language that is now section 162 (a) (2). Compare section 214 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057. Hence taxpayers who incur meal expenses while traveling away from home now receive a tax windfall in that, unlike taxpayers who pay for meals while "at home," they are permitted to deduct some expenses that are incontestably "personal" as that term is used in section 262, *i.e.*, that portion of their meal expenses that they would have incurred had they not been traveling.

This codified accounting convenience intensifies the windfall which accrues to taxpayers like Correll and Hanson as against such taxpayers as Osteen and Amoroso. It may well be the reason why the Commissioner sought to invoke the over-

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[7] *But cf. James* v. *United States*, 9 Cir., 1962, 308 F.2d 204, where taxpayer, an unmarried traveling salesman, lived in hotels the year around. Properly, no deduction was allowed, on the theory that he had no "home" to be away from.

[8] See Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 2 and 13, 1921 (Confidential Committee Print, subsequently released for publication), pp. 50, 234-35.

night rule. In any event, we think it a good reason to do so. We see no justification for allowing salesman Correll two meals, and salesman Amoroso none. Nor would we give Amoroso one and commuter Osteen none. Equally, we see no reason, to take a frequently referred to hypothetical, why a man who makes a quick trip to Washington, missing neither breakfast nor dinner at home, should be allowed his lunch merely because he is traveling more miles than Amoroso, the salesman who travels locally. The courts in *Hanson* and *Correll* do not discuss this inevitable question. We think, at best, that all they do is to push the dividing line somewhere else, with no avoidance of the ultimate necessity, and difficulty, of drawing it. At worst, they make the drawing of it considerably harder.*

We believe that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot luck in the courts, is to accept the Commissioner's sleep or rest rule. If in some instances it be thought illogical, it is not uninteresting to note that the very circuit which has been relied on to justify a substantial assault on the Commissioner's rule is the one which has most succinctly pointed out that fairness and administrative consistency in this area are more important than the total pursuit of logic. See *Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F.2d 496, 503-05.

Nor do we find the Commissioner's rule wide of the mark as a matter of statutory construction. Admittedly all travel is not "away from home." Not only have the courts recognized this even when travel was not strictly commuting, *Clarence J. Sapp,* 1961, 36 T.C. 852, *aff'd per curiam,* 5 Cir., 309 F.2d 143, but, were the contrary interpretation given, in qualifying travel as "away from home" the statute would be redundant. Since a

* It is not at all clear, for example, whether the court in *Hanson* would be prepared to grant a deduction to Amoroso. See 298 F.2d at 397.

line must be drawn somewhere, it seems not unreasonable to say that the test of whether travel is away from home is whether it is so extensive as to require "lodging," *viz.*, that "meals and lodging" be read in the conjunctive. This construction arguably finds some historical corroboration.[10] We believe, in any event, that it is a reasonable compromise in what seems otherwise an impossible situation.

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[10] The Treasury Regulation in response to which the deduction for the entire amount of travel expenses was originally passed consistently used language like "railroad fares, and meals and lodging" as though meals and lodging were to be read together. Had it been intended that the words should be read disjunctively the phrase "railroad fares, meals, and lodging" would have been more appropriate. Treas. Reg. art. 292 (1960 ed.). Likewise, all versions of the statute since its enactment in 1921 have used the terms in conjunction in permitting the deduction of the "entire amount" expended on them. If this is not intended to suggest a connection between them it makes little sense, since even under the Commissioner's original regulation permitting the deduction of only the excess of the "entire amount" of expenditures, lodging would have been ordinarily deductible because it was a duplicated expense. The only case in which this would not hold true would be where one's abode was sufficiently permanent to constitute a "home" and yet cost less to maintain when the taxpayer was away. It would seem that such a situation is sufficiently unlikely to occur, or if it does occur sufficiently unlikely to amount to any substantial avoidance of duplication, to indicate that it was not what Congress was primarily concerned with treating when it drafted the statute in question. Accordingly, if this analysis is correct the purpose of linking meals and lodging, rather than merely specifying the deduction of the "entire amount" of meals alone, is to indicate that a deduction is to be granted when expenses for both are incurred.

Admittedly when Congress enacted section 62 (2) (B) in 1954, 1954 I.R.C. § 62 (2) (B), providing for the deduction of travel expenses from gross income, the wording "expenses of travel, meals, and lodging" was used. However, the committee reports on that section also contain the only specific indication that Congress was aware of and accepted the Commissioner's interpretation of the statutory language. They state, "At present, business transportation expenses can be deducted by an employee . . . only if they are reimbursed by the employer or if they are incurred while he was *"away from home overnight."* S. Rep. No. 1622, 83d Cong., 2d Sess., 9, 169; H.R. Rep. No. 1337, 83d Cong., 2d Sess., 9, A19. (Ital. suppl.) Therefore it seems reasonable to conclude, at the least, that the change in phraseology was not intended to alter the previous meaning of section 162 (a) (2).

It would be an insuperable objection to the sleep or rest rule if not merely meals, but also business transportation costs, were deductible only if incurred in connection with lodging. However, in spite of the fact that section 162 (a) (2) links the deduction of travel expenses with the deduction of meal costs, such correlation has not been uniformly required. *E.g., Summerour* v. *Allen,* M.D. Ga., 1951, 99 F.Supp. 318; *Joseph M. Winn,* 1959, 32 T.C. 220. In some circumstances transportation may be an ordinary and necessary expense under the general provisions of section 162, *E.g., Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F.2d 496; *Clarence J. Sapp, supra. Cf.* I.R.C. § 62 (2) (C). *But cf. Crowther* v. *Commissioner,* 9 Cir., 1959, 269 F.2d 292; *Rice* v. *Riddell,* S.D. Calif., 1959, 179 F.Supp 576.[11] The fact that some transportation costs are deductible even where meals would not be not only removes the necessity of making a liberal interpretation of section 162 (a) (2), but in itself suggests that "travel away from home" with its specific inclusion of meals and lodging, means travel in a substantial sense and not a diurnal round starting and ending at home.

On this basis the present taxpayer is not entitled to the deduction. Nor do we find it an answer to say that had he

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[11] A decision involving transportation only is our case of *Chandler* v. *Commissioner,* 1 Cir., 1955, 226 F.2d 467. There taxpayer had two jobs, in two different places. We held that transportation to one was commuting and not deductible, but that the cost of traveling to the second could be deducted. Under ordinary circumstances this would be a sound result—the cost of transportation to the second job would seem a necessary and proper business expense. *Steinhort* v. *Commissioner, supra.* The difficulty is that taxpayer had taken the standard deduction, which at that time included, and therefore prevented additional itemization of, all "necessary and proper" business expense. Accordingly, Chandler had, in effect, received this travel deduction, if it were to be so categorized. Consequently, in order to permit taxpayer to recover, the court had to hold that travel to this second job, although, strictly, it was no greater in mileage or hours than commuting to the first, was "travel away from home," this being a deduction not included in the standard deduction.

We must agree with the Commissioner that this was an instance of a hard case making bad law. At that time the 1939 Code made a totally arbitrary dis-

chosen to stay overnight, instead of coming home late, the result would have been otherwise. Not only in a rule of thumb, but in any application of principles there has to be a dividing line, and in as complex an area as this one the line is bound to be indistinct. It can become totally lost by talking equivalents.

We can think of no sharper place to draw the line, and since we also think of no better one, we accept what has long been the Commissioner's.

The decision of the Tax Court is vacated and the cause remanded for further proceedings.

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tinction between employee taxpayers who incurred transportation expenses for which they were not reimbursed and those who were reimbursed. 1939 I.R.C. §§ 22 (n) . (2) , (3) . The former could deduct transportation expenses from gross income and take the standard deduction as well only if they were travel expenses incurred away from home on business, while the latter could take both deductions for all legitimate business transportation expenses. Additionally, self-employed taxpayer could also take both deductions. 1939 I.R.C. § 22 (n) (1) . Possibly because such a distinction between similarly situated taxpayers was grossly discriminatory the court strained to construe the transportation as involving travel away from home in order to rectify the inequity. This discrimination was eliminated by the enactment of section 62 (2) (C) of the 1954 I.R.C. and the transportation expenses incurred by Chandler would today be deductible from gross income under this section. However, we must conclude that the decision in *Chandler* is incorrect as a guide to the construction of section 162 (a) (2) . Compare *Kenneth Waters*, 1949, 12 T.C. 414 (dissenting opinion) .